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Breaking Developments in Long Term Care and Senior Housing Law

4/6/07

MS Issues Q&A as Final Guidance on Requirements of Deficit Reduction Act

As most providers know by now, the federal Deficit Reduction Act (“Act”) requires covered providers to establish written policies aimed at educating employees about false claims and whistleblower protections. Section 6032 of the Act applies to all entities that receive or bill at least \$5 million in Medicaid funds. Compliance with the employee education provisions of the Act is a prerequisite to receiving Medicaid funds. The Act went into effect on January 1, 2007.

The Act’s provisions with respect to employee education are deceptively brief. Section 6032 requires that qualifying entities:

- (A) establish written policies for all employees of the entity (including management) and of any contractor or agent of the entity, that provide detailed information about the False Claims Act [31 USC §§3729-33], administrative remedies for false claims and statements [31 USC chapter 38], [state false claims acts], and whistleblower protections under such laws ... ;
- (B) include as part of such written policies, detailed provisions regarding the entity’s policies and procedures for detecting and preventing fraud, waste and abuse; and
- (C) include in any employee handbook for the entity, a specific discussion of the laws described in subparagraph (A), the rights of employees to be protected as whistleblowers, and the entity’s policies and procedures for detecting and preventing fraud, waste and abuse.

Although these provisions are short, there has been much confusion by government and providers alike as to what the provisions actually require, and how compliance should be approached.

The Centers for Medicare and Medicaid (CMS) attempted to clear some of this confusion about the employee education requirements of the Act in a December 13, 2006, State Medicaid Director Letter (#06-024), and in a follow-up teleconference held with providers on January 11, 2007. During this teleconference, providers had the opportunity to ask questions of CMS officials and express concerns. While CMS provided responses to many of these questions, the

agency took many more back for further consideration and promised a document with responses in the future.

Recently, CMS provided its responses. On March 22, 2007, CMS issued its “Frequently Asked Questions” (“FAQ”) as a supplement to the December 13, 2006, [State Medicaid Director Letter](#). Through answers to [71 different questions](#), the FAQ attempts to address a broad array of subtopics implicated by Section 6032. Some of these subtopics, along with a brief summary of CMS’ response, include:

What is an “entity” in the context of parents and subsidiaries? [“An entity includes organization units ... as long as the organizational unit receives or makes payments totaling at least \$5 million annually ...”]

How is the \$5 million threshold computed? [“If an entity receives or makes payments totaling \$5 million during a Federal fiscal year (October 1 to September 30), then the entity must comply as of January 1 of the next calendar year”].

What is a Contractor or Agent? [Individuals, businesses, or organizations that perform functions not associated with the provision of Medicaid health care items or services, such as copy or shredding services, grounds maintenance, or hospital cafeteria or gift shop services, are excluded from the definition of “contractor.”].

Must Contractors and Agents actually adopt the provider’s policies? “[The entity must disseminate the policies to the contractor or agent, which must then abide by the policies as to the work the contractor or agent performs for the entity ...”].

Will CMS provide model policies? [No.].

Will the US Department of Justice provide a summary of the Federal False Claims Act? [Yes. The summary is available at the CMS website. [\(Federal False Claims Act\)](#)]

Is training required? [“There is no training requirement for compliance with Section 6032.”].

Will CMS defer enforcement until after it releases further guidance? [“No. There is no grace period for compliance with Section 6032”].

Although the FAQ document goes a long way to answering many of the questions posed by providers and legal advisors about Section 6032, many compliance details are still left unresolved. But one thing remains clear -- more than ever before, a written documented plan for compliance with federal regulations is mandatory. Compliance plans and employee handbooks should be reviewed now to incorporate the necessary revisions and details about the False Claims, administrative remedies for false claims and statements under the False Claims Act, any applicable state false claims acts and whistleblower protections under such laws. For providers who must make revisions to their employee handbooks to comply with the employee education requirements of the Act, revised employee handbooks should be disseminated to all employees and signed acknowledgement forms from each employee should be collected and placed in the

employee's personnel file. All relationships with agents and contractors should also be evaluated, and decisions made about how to take steps to ensure these third parties are abiding by the provider's new policies. As with all federal regulatory compliance efforts, providers should document each step in writing.

Section 6032 of the Act requires new and potentially onerous requirements on providers. While there may not yet be comprehensive guidance for compliance, providers should be keenly aware of, and utilize, the guidance that is available, including CMS's recent FAQ document.

For more information, please contact the Long Term Care and Senior Housing Law Group at:

206.223.7000 Seattle
503.778.2100 Portland
360.754.6001 Olympia
longtermcareandseniorhousing@lanepowell.com
www.lanepowell.com

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